UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GOLDEN STATE FOODS CORP., a California Corporation Plaintiff, v. COLUMBIA/OKURA LLC, a Washington Limited Liability Corporation; and DOES 1 through 100, inclusive, Defendants.	CV 13-8150 RSWL (VBKx) **STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION [15]**

After consideration of all the papers submitted pursuant to Defendant Columbia/Okura LLC's ("Defendant") Motion for Summary Judgment, or in the Alternative, Summary Adjudication [15], the Court makes the following findings of fact and conclusions of law.

UNCONTROVERTED FACTS

1. Defendant offered to install two robotic palletizers at the facility of Plaintiff Golden State

Foods Corp. ("Plaintiff") in the City of Industry, California. The quotation number was 3633Q2a and dated June 28, 2007 (the "Quotation"). Def.'s Statement of Uncontroverted Facts and Conclusions of Law ("SUF") # 1; Pl.'s Separate Statement of Uncontroverted Material Facts and Conclusions of Law ("SSUMF") # 1

2. On or about September 5, 2007, Plaintiff's plant manager, Jorge Hasbun, signed the signature page of the approval package for the Quotation, and the signature was communicated to Defendant. SUF # 2; SSUMF # 2.

3. On or about September 21, 2007, a representative of Defendant signed a GSF Preferred Vendor Master Supply and Services Agreement (the "GSF Agreement") and sent it to Plaintiff. SUF # 3; SSUMF # 3.

4. On or about October 1, 2007, Plaintiff prepared an AIA Standard Form of Agreement Between Owner and Contractor (the "AIA Agreement"), which was signed on behalf of Plaintiff by Richard D. Moretti, and by Brian Hutton on behalf of Defendant on October 13, 2007. SUF # 3; SSUMF # 4.

5. On January 23, 2013, Plaintiff pleaded guilty to a violation of California Labor Code § 6425(a) for the willful violation of Title 8 of the California Code of Regulations § 3314(h) - failure to conduct periodic inspections of energy control procedures. SUF # 6; SSUMF # 6; Keleti Decl. Ex. F at 32.

6. Plaintiff did not submit any written claims to Defendant or participate in mediation or arbitration prior to filing the instant Action in state court on July 9, 2013. SUF # 9; SSUMF # 9.

CONCLUSIONS OF LAW

1. The Court finds that the AIA Agreement and the GSF Agreement are the operative contracts governing this Action. SUF ## 3-4; SSUMF ## 3-4; Mot. 7:1-22, 8:20-9:21; Opp'n 17:12-18:21. Given that the Parties do not appear to dispute that the AIA and GSF Agreements are the governing contracts and because "[t]he existence of an integration clause is a key factor" in determining whether the Parties "intended the contract to be a final and complete expression of their agreement," the Court finds that the AIA and GSF Agreements constitute the entire contract governing the Parties' relationship here. Grey v. Am. Mgmt. Servs., 204 Cal. App. 4th 803, 807 (2012) (citing Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., 109 Cal. App. 4th 944, 953-54 (2003)).

2. California defines "[i]ndemnity" as "a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." Cal. Civ. Code § 2772. "An indemnity agreement is to be interpreted according to the language of the contract as well as the intention of the parties as indicated by the contract." Myers

Bldg. Indus., Ltd. v. Interface Tech., Inc., 13 Cal. App. 4th 949, 968 (1993) (citing Widson v. Int'l Harvester Co., Inc., 156 Cal. App. 3d 45, 59 (1984)); Crawford v. Weather Shield Mfg. Inc., 44 Cal. 4th 541, 552 (2008). "The extent of the duty to indemnify is determined from the contract." Myers Bldg. Indus., 13 Cal. App. 4th at 968 (citing Herman Christensen & Sons, Inc. v. Paris Plastering Co., 61 Cal. App. 3d 237, 245 (1976)).

3. "In California, a condition precedent is 'one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed.'" NGV Gaming Ltd. v. Upstream Point Molate, LLC, 355 F. Supp. 2d 1061, 1064 (N.D. Cal. 2005) (quoting Cal. Civ. Code § 1436). A condition precedent "is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises." Id. (quoting Platt Pac., Inc. v. Andelson, 6 Cal. 4th 307, 313 (1993)); Sosin v. Richardson, 210 Cal. App. 2d 258, 261 (1963); 1 Witkin, Summary of California Law, Contracts, § 721 (10th ed. 2005). "Conditions precedent are disfavored and will not be read into a contract unless required by plain, unambiguous language." Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 559 n.7 (9th Cir. 1990) (citing In re Bubble Up Dela., Inc., 684 F.2d 1259, 1264 (9th Cir. 1982)). However, "[a] contract is unenforceable if a

condition precedent is not met." Willard v. Valley Forge Life Ins. Co., 218 F. Supp. 2d 1197, 1201 (C.D. Cal. 2002) (citing Platt Pac., 6 Cal. 4th 307; Metro Life Ins., Co. v. Devore, 66 Cal. 2d 129 (1967)).

4. Defendant bears the initial burden of showing that liability is barred by a condition precedent. Clarke Logistics v. Burlington N. and Santa Fe Ry. Co., 347 F. Supp. 2d 891, 894 (S.D. Cal. 2004) (citing G.E.J. Corp. v. Uranium Aire, Inc., 311 F.2d 749, 752 (9th Cir. 1962)).

5. Defendant has provided evidence that Plaintiff did not provide written notice to Defendant of its claims prior to the institution of the present Action on July 9, 2013. SUF # 9; SSUMF # 9; Hutton Decl. ¶ 9. Defendant has presented evidence that Plaintiff failed to participate in either mediation or arbitration prior to filing suit in Los Angeles Superior Court. Id.

6. The burden then shifts to Plaintiff to create a genuine issue of material fact that it in fact presented written notice of these claims or that it participated in mediation or arbitration prior to initiating this litigation. Fed. R. Civ. P. 56.

7. The Court finds that Plaintiff does not create a genuine issue of material fact that it presented written notice of its claims or that it participated in mediation or arbitration prior to initiating litigation.

7. The Court finds that Defendant fails to show

"plain, unambiguous language" indicating that the 21 day written notice requirement is a condition precedent to the initiation of litigation. In interpreting a contract, courts "are guided by the standard of reasonableness." In re James E. O'Connell, Inc., 799 F.2d 1258, 1261 (9th Cir. 1986) (citing Southland Corp. v. Emeral Oil Co., 789 F.2d 1441, 1443 (9th Cir. 1986)); Cal. Civ. Code § 3542. And in the absence of "plain, unambiguous language" creating a condition precedent, courts typically will not find such a condition exists. Southland Corp., 789 F.2d at 1444; Vogt-Nem, Inc. v. M/V Tramper, 263 F. Supp. 2d 1226, 1232 (N.D. Cal. 2002). The Court finds that the 21 day written notice requirement language in the AIA Agreement does not create a condition precedent to seeking judicial resolution of claims.

8. The Mediation provisions explicitly state that "[a]ny Claim arising out of or related to the Contract . . . shall . . . be subject to mediation *as a condition precedent* to arbitration or the institution of legal or equitable proceedings by either party." Id. at 56 (emphasis added). The Arbitration provisions mandate that claims not resolved in mediation must be decided by arbitration. Id. The language of the AIA Agreement could not be more clear: mediation is a condition precedent to arbitration and arbitration is the sole forum for adjudicating disputes, unless the

Parties agree otherwise. Id. The Court finds that mediation is a condition precedent arbitration or litigation.

9. The failure to mediate or arbitrate a contract that makes mediation or arbitration a condition precedent to filing a lawsuit has been held to warrant dismissal. See Delamater v. Anytime Fitness, Inc., 722 F. Supp. 2d 1168, 1180-81 (E.D. Cal. 2010); Brosnan v. Dry Cleaning Station Inc., No. C-08-02028 EDL, 2008 WL 2388392, at *1 (N.D. Cal. June 6, 2008); KKE Architects, Inc. v. Diamond Ridge Dev. LLC, No. CV 07-06866 MMM (FMOx), 2008 WL 637603, at *4-7 (C.D. Cal. Mar. 3, 2008). This has been the case even when a party is left without recourse. See 24 Hour Fitness, Inc. v. Superior Court, 66 Cal. App. 4th 1199, 1215-16 (1998) (affirming summary judgment against plaintiff was appropriate where the parties had an arbitration agreement governing plaintiff's employment claims and plaintiff failed to initiate arbitration within the agreement's one year deadline, even though plaintiff was left with no recourse against these defendants); see also Platt Pac., 6 Cal. 4th at 321.

9. The Court finds that both Plaintiff's breach of contract and breach of express indemnity claims are founded and based on the AIA Agreement. Because both claims allege that the dispute arises from Defendant's performance of the AIA Agreement, both claims relate to

or arise out of the AIA Agreement. Therefore, they fall within the scope of the Mediation and Arbitration sections of the AIA Agreement and are thus subject to mediation as a condition precedent to their litigation.

10. A claim for breach of the covenant of good faith and fair dealing may be disregarded as superfluous if it "relies upon essentially the same allegations" as a companion "breach of contract claim." In re Facebook PPC Adver. Litig., 709 F. Supp. 2d 762, 770 (N.D. Cal. 2010). In short, where a party alleges the breach of an actual term, "a separate implied covenant claim, based on the same breach, is superfluous." Guz v. Bechtel Nat'l Inc., 24 Cal. 4th 317, 327 (2000).

11. Because Plaintiff's breach of contract and breach of the covenant of good faith and fair dealing claims are premised entirely on the same breach (Compl. ¶¶ 11, 17), Plaintiff's breach of the covenant of good faith and fair dealing claim is superfluous.

12. Ordinarily, "where parties have expressly contracted with respect to the duty to indemnify, the extent of that duty is generally determined from the contract *and not by reliance on the independent doctrine of equitable indemnity*." Maryland Cas. Co. v. Bailey & Sons, Inc., 35 Cal. App. 4th 856, 864 (1995) (emphasis added) (citing Rossmoor Sanitation, Inc. v. Pylon Inc., 13 Cal. 3d 622, 628 (1975), Reg'l Steel

Corp. v. Superior Court, 25 Cal. App. 4th 525, 529 (1994)). Quite simply, "principles of equitable or comparative indemnity are inapplicable when parties have an express indemnity agreement." Reg'l Steel Corp., 25 Cal. App. 4th at 526.

13. The indemnification provisions in the AIA and GSF Agreements are coextensive with implied and equitable indemnification principles. Smoketree-Lake Murray v. Mills Concrete Constr. Co., 234 Cal. App. 3d 1724, 1736-37 (1991).

14. As express indemnity clauses are entitled to "a certain preemptive effect, displacing any implied rights which might otherwise arise within the scope of its operation," the Court finds that the Parties' express indemnity clauses operate to bar Plaintiff's equitable indemnity claim. E.L. White, Inc. v. City of Huntington Beach, 21 Cal. 3d 497, 507-08 (1978); see also Wells Fargo Bank, N.A. v. Renz, 795 F. Supp. 2d 898, 913 n.6 (N.D. Cal. 2011) (finding that "the fact

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that the parties' relationship in this case is governed by an express indemnity clause arguably forecloses Plaintiff's claim for equitable indemnity").

IT IS SO ORDERED.

DATED: June 26, 2014

RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge